Office-Supreme Court, U.S.
FILED
JAN 16 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 769

TOM E. RODGERS,
Petitioner,

vs.

BALTIMORE & OHIO RAILROAD CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB RASSNER,
Attorney for Petitioner,
15 Park Row,
New York 38, N. Y.

Adams Press Corp., 82 Beekman Street, N. Y.—Beekman 3-1050-51 110

TABLE OF CONTENTS

	PAGE
REPORTS OF THE COURT BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
REASONS FOR GRANTING THE WRIT	2
STATEMENT	3
ARGUMENT	4
CONCLUSION	5
APPENDIX:	
A—Judgment	6
B—Memorandum Opinion and Order of Dawson, D. J.	7

Cases Cited

Reed v. Steamship Yaka, 83 S. Ct. 1349, 373 U. S. 410	4
Rodgers v. Baltimore & Ohio Railroad Co., 323 F. 2d 997	2

Statutes Cited

Federal Employees Liability Act	2-5
Jones Act	2, 4
Longshoremen and Harbor Workers' Compensation Act	2, 4
28 U.S.C.A.:	
1254 (1), 2101	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. _____

TOM E. RODGERS,

Petitioner,

vs.

BALTIMORE & OHIO RAILROAD CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, TOM E. RODGERS, prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit, entered on the 18th day of October, 1963.

Reports of the Court Below

The memorandum opinion of Honorable ARCHIE O. DAWSON, U. S. D. J., Judge of the United States District Court of the Southern District of New York, dated February

25th, 1963, and a final order of dismissal in favor of respondent, dated February 25th, 1963, are printed in the record below.

The opinion of the United States Court of Appeals, dated October 18th, 1963, is set forth herein; Appendix A. The opinion is reported as *Rodgers* v. *Baltimore & Ohio Railroad Co.*, 323 F. 2d 993. The opinion of the Trial Court is not officially reported.

The memorandum opinion is set forth herein; Appendix B.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28 U. S. C. A., 1254 (1) and 2101.

Questions Presented

Is a railroad employee entitled to the same remedial rights against his employer as a shipboard employee injured under identical circumstances.

Reasons for Granting the Writ

Because of the inherent dangers of railroading, Congress, by enacting the Federal Employees Liability Act, gave to the railroad worker that necessary protection from personal injury which he may suffer through the negligence of his employer.

The Jones Act, modeled after the Federal Employees Liability Act, afforded the seaman the same protection for the same reasons.

The decision of the Court below, in relegating a railroad worker's remedy for injuries sustained through the negligence of his employer, to the Longshoremen and Harbor Workers' Compensation Act, has reduced that protection given the employee under the Federal Employee's Liability

Act, which is incongruous to the very principles under which the Federal Employee's Liability Act was enacted in the first instance.

The decision of the Court below then leaves the railroad employee with less remedial rights than a seaman who is injured under precisely the same circumstances.

Statement

The facts upon which petitioner predicated his cause of action and now charges error are literal excerpts from the memorandum opinion by the Trial Court, United States District Judge ARCHIE O. DAWSON.

> "Plaintiff's job was that of a stowman which entailed the handling of freight. On the day of the accident he was engaged in loading railroad freight cars on carfloat No. 216. Carfloat No. 216 was a vessel exceeding eighteen tons in weight and was, at the time of the accident, tied up at Pier 63, North River, upon the navigable waters of the United States; plaintiff was not a master or member of the crew."

> "It appears from the papers and the uncontested facts that the defendant Baltimore & Ohio Railroad Company is such an employer, part of whose employees are employed on the navigable waters of the United States, and it further appears that plaintiff's injury occurred on such navigable waters. It appears and is admitted without dispute that the injury occurred while plaintiff was on a carfloat, engaged in work incident to the loading or unloading of freight, and that this carfloat was in navigable waters."

Argument

The Court below found that petitioner was an employee of the respondent railroad and that petitioner's injury occurred while engaged in the performance of his duties for and on behalf of the respondent railroad.

But, the Court below found that because the accident occurred on a car float in navigable waters, that petitioner's sole remedy was the Longshoremen and Harbor Workers' Compensation Act.

Petitioner was exposed to the same dangers and under the same circumstances had he been a seaman aboard the car float rather than a railroad employee. If that would be the case clearly petitioner could exercise his rights under the Jones Act, and the Longshoremen's Act would play no part in the matter.

This Court, as recently as May 27th, 1963, in *Reed* v. *Steamship Yaka*, 83 S. Ct. 1349, 373 U. S. 410, has held:

> "As we said in a slightly different factual context, 'all were subjected to the same danger. All were entitled to like treatment under law.' We conclude that petitioner was not barred by the Longshoremen's Act from relying on Pan-Atlantic's liability as a shipowner for the Yaka's unseaworthiness in order to support his libel in rem against the vessel."

The instant case is analogous to *Reed* v. *Steamship Yaka*, *supra*. A longshoreman is entitled to protection against the dangers of an unseaworthy vessel regardless of the fact that the longshoreman may be the employee of the shipowner. A seaman is entitled to the protection of the Jones Act because of the fact that he is the employee of the shipowner. It follows then that a railroad worker is entitled to the protection of the Federal Employee's Lia-

bility Act because of the fact that he is an employee of the railroad, and regardless of the fact that the injury occurred on a carfloat. The circumstance under which each employee is exposed to danger are the same.

CONCLUSION

It is respectfully urged that there is herein an important question of the remedial rights of a railroad employee such that merits consideration and review by this Honorable Court.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

DONALD D. OLMAN,
On the Petition.

[APPENDIX FOLLOWS]

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York on the 18th day of October, one thousand nine hundred and sixty-three.

Present:

HON. STERRY R. WATERMAN,
HON. PAUL R. HAYES,
HON. THURGOOD MARSHALL,

Circuit Judges.

TOM RODGERS,

Defendant-Appellant,

v.

BALTIMORE & OHIO RAILROAD CO.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York; and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the appellee.

A. DANIEL FUSARO
Clerk.

APPENDIX B

Memorandum Opinion and Order of Dawson, *D. J.*

DAWSON, D. J.:

This is a motion for summary judgment under Rule 56 of the Rules of Civil Procedure, for an order dismissing the action on the ground that this Court does not have jurisdiction of the subject matter. The action is one brought, allegedly, pursuant to the provisions of the Federal Employers' Liability Act. It is to recover for personal injuries sustained on August 22, 1959. The plaintiff claims to have been injured on that day while performing his duties as an employee of the defendant.

The following are the facts which appear to exist without substantial controversy:

Plaintiff's job was that of a stowman which entailed the handling of freight. On the day of the accident he was engaged in loading railroad freight cars on carfloat No. 216. Carfloat No. 216 was a vessel exceeding eighteen tons in weight and was, at the time of the accident, tied up at Pier 63, North River, upon the navigable waters of the United States; plaintiff was not a master or member of the crew. The defendant has secured payment of compensation benefits for its employees entitled thereto under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and defendant has furnished and plaintiff has accepted compensation benefits and medical care under the Act.

In its answer the defendant has pleaded as an affirmative defense that plaintiff's sole and exclusive remedy is under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

It is clear that where the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §§901-950) applies it is the exclusive statute under which an employee may recover from his employer. 33 U.S.C. §905; *Pennsylvania R. Co.* v. *O'Rourke*, 344 U. S. 334 (1953).

The issue therefore is whether this act was applicable to the plaintiff in this action. The act applies to employers "any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock.)" 33 U.S.C. §902(4).

It appears from the papers and the uncontested facts that the defendant Baltimore & Ohio Railroad Company is such an employer, part of whose employees are employed on the navigable waters of the United States, and it further appears that plaintiff's injury occurred on such navigable waters. It appears and is admitted without dispute that the injury occurred while plaintiff was on a carfloat, engaged in work incident to the loading or unloading of freight, and that this carfloat was in navigable waters. Plaintiff was covered by the Longshoremen's and Harbor Workers' Compensation Act and received compensation thereunder.

Although plaintiff was an employee of a railroad, it is none the less clear that the Federal Employers' Liability Act, 45, U.S.C. §51, et seq., does not apply to injuries coming within the scope of the exclusive provisions of the Longshoremen's and Harbor Workers' Compensation Act. The rights of a railroad employee against the railroad employer, when he is injured, are determined by where the injury occurs. *Pennsylvania R. Co.* v. *O'Rourke*, 344 U. S. 334, at p. 340. Plaintiff was acting as a stevedore for the railroad at the time the injury occurred on the carfloat, and

this would appear to be just the sort of accident to which the Longshoremen's and Harbor Workers' Compensation Act was meant to apply. See, *West v. Erie Railroad Co.*, 163 F. Supp. 879 (S. D. N. Y. 1958).

Since the essential facts leading to this controversy exist without substantial dispute, there is no issue to be tried.